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In the Supreme Court of the United States

October Term, 1930

CONCORDIA INSURANCE COMPANY OF MILWAUKEE, WISCONSIN, Petitioner,
vs.
SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, Respondent. — NO. 278

ROYAL INSURANCE COMPANY, LTD., Petitioner,
vs.
SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, Respondent. — NO. 279

NATIONAL FIRE INSURANCE COMPANY, Petitioner,
vs.
SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, Respondent. — NO. 280

FIRE ASSOCIATION OF PHILADELPHIA, Petitioner,
vs.
SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, Respondent. — NO. 281

RESPONDENT'S PROTEST AND BRIEF AGAINST THE ISSUANCE OF WRITS OF CERTIORARI

R. M. Rainey,
Streeter B. Flynn,
Frank G. Anderson,
Chester H. Lowry,
Counsel for Respondent.

Rainey, Flynn, Green & Anderson, of Counsel.

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NO. 281

RESPONDENT'S PROTEST AND BRIEF AGAINST THE ISSUANCE OF WRITS OF CERTIORARI

Petitioners seek the issuance of writs of certiorari upon two grounds, namely:

1. Because interest was allowed respondent upon the verdicts of the jury from one hundred and twenty days after the loss up to the date of said verdicts.
2. Because the court held the petitions stated facts sufficient to constitute a waiver of written, verified proof of loss.

We will discuss these grounds in the order named.

I.

Was respondent entitled to interest upon the verdicts of the jury from one hundred and twenty days after the loss up to the date of said verdicts?

We respectfully submit that it would have been impossible for the Circuit Court of Appeals to have decided this question either way without being in conflict with some of the decisions of the Supreme Court of Oklahoma. There are decisions of the state court sustaining petitioners' position, and there are decisions of the same court amply sustaining the holding herein of the Circuit Court. The Circuit Court, therefore, had to exercise its judgment as to what was the law upon the subject, and we respectfully suggest that its holding is correct, just, and is sustained by the best reasoned decisions of the Oklahoma Court.

The earliest decision of the Supreme Court of Oklahoma upon which petitioners rely, is *City of Chickasha* v. *Hollingsworth,* 56 Okla. 341, 155 Pac. 859. That case did not involve a recovery upon an insurance policy, but was an

action for the recovery of unliquidated damages in the true sense of the word. The Court applied Section 5972, Compiled Oklahoma Statutes 1921 (quoted in petitioners' brief, page 10), which provides when interest may be recovered where the damages are unliquidated.

The next decision (in point of time) was *St. Paul Fire & Marine Ins. Co.* v. *Robinson*, 72 Okla. 269, 180 Pac. 702, cited by petitioners. That involved a recovery under a policy insuring growing crops against loss or injury by hail. The Court followed *City of Chickasha* v. *Hollingsworth, supra*, and applied the same rule and the same statute. An examination of that case discloses no other authority was considered.

Petitioners also rely upon *Speed* v. *McMurray*, 73 Okla. 325, 176 Pac. 506. That was an action to recover damages on account of fraud in exchange of real estate. The Court bases its ruling upon *City of Chickasha* v. *Hollingsworth, supra*, and no other authority.

Perhaps the next case decided by the Oklahoma Court involving recovery of interest upon damages, is *City of Oklahoma City* v. *Hoke*, 75 Okla. 211, 182 Pac. 692. That case involved damages to growing crops, caused by flood waters. The Court held the plaintiff was entitled to interest upon the damages found from the date of the loss. The Court says *City of Chickasha* v. *Hollingsworth, supra*, is

distinguishable, but does not say how. Petitioners do not cite this case.

The next case decided by the Oklahoma Court involving this question, is *Hartford Fire Ins. Co.* v. *Bernard,* 99 Okla. 44, 221 Pac. 1011. That involved recovery upon a fire insurance policy for the loss of an automobile destroyed by fire. The Court held the plaintiff was entitled to interest upon the amount of the loss from approximately sixty days after proof of loss was furnished. The Court does not refer to *City of Chickasha* v. *Hollingsworth, supra,* nor *St. Paul Fire & Marine Ins. Co.* v. *Robinson, supra.* It does say the action was to recover upon a written contract, which provided the amount plaintiff was entitled to recover, in the event of the loss of the property, based upon the market value of the property insured. The Court cites with approval *Randall* v. *American Fire Ins. Co.,* 25 Pac. 953 (Mont.); *Bernhard* v. *Rochester German Ins. Co.,* 79 Conn. 388, 8 Am. & Eng. Ann. Cases 298; *Palatine Ins. Co.* v. *O'Brien,* 107 Md. 341, 68 Atl. 484. *Bernard* v. *Rochester German Ins. Co., supra,* cited with approval by the Supreme Court of Oklahoma, is also cited with approval by the Circuit Court of Appeals in the case at bar.

Petitioners cite *Midland Valley Ry. Co.* v. *Price,* 127 Okla. 106, 260 Pac. 26, decided October 11, 1927. In that case the Court held plaintiff was entitled to interest on his recovery for injuries to a shipment of cattle. On the same

date an opinion was filed in *City of Tulsa* v. *Copp*, 127 Okla. 128, 260 Pac. 16. In the latter case the Court held plaintiff was entitled to interest on the amount recovered as damages to a building. Petitioners do not cite this case. The Court there distinguishes *City of Chickasha* v. *Hollingsworth, supra*, and reviews Secs. 5972, 5973, 5996, Compiled Oklahoma Statutes 1921. The Court further says the test is not whether the damages are unliquidated, or otherwise, but whether the injury and consequent damages are complete and not continuing, and can, or must be ascertained as of a particular time in accordance with fixed rules of evidence and known standards of value. The Court says that under present day methods of engineering, construction and standards of value and costs, it would be as possible to ascertain the approximate cost of the construction or repair of a building, as it would be to ascertain the value of personal property having a fixed or market value.

The petitions allege (Tr. 15) that the insurance companies by their agents and adjusters represented to respondent, after the loss, that the furniture and fixtures destroyed were of a value far in excess of the insurance thereon. Also, that said insurance companies stated they knew approximately to the dollar what it would cost to replace the building.

The attention of the Circuit Court of Appeals was di-

rected to all of the foregoing cases, both in the briefs and in the oral argument which was had on February 3, 1930.

The opinion by the Circuit Court of Appeals was filed April 18, 1930. On April 8, 1930, ten days before the opinion in this cause, the Supreme Court of Oklahoma again decided the question and held interest was not recoverable prior to judgment. *American Eagle Fire Ins. Co.* v. *Lively*, 286 Pac. 797 (not yet reported in Oklahoma Reports). The opinion refers to *St. Paul Fire & Marine Ins. Co.* v. *Robinson, supra*, but does not mention *Hartford Ins. Co.* v. *Bernard, supra; City of Oklahoma City* v. *Hoke, supra*, and *City of Tulsa* v. *Copp, supra*, which are to the contrary.

It will be observed the decisions of the Oklahoma Supreme Court are in a rather hopeless conflict. The reason may be that ascribed by the Supreme Court of Wisconsin in *Laycock* v. *Parker*, 103 Wis. 161, 79 N. W. 327, in which it is said:

> "The question of interest is one much more often passed upon than carefully considered by the courts. It is usually presented only incidentally to much more important issues, and often decided one way or the other at the close of exhaustive investigation of the other questions, and with the perhaps unconscious feeling that it is not of sufficient magnitude to justify further serious labor."

In *St. Paul Fire & Marine Ins. Co.* v. *Robinson, supra*, the interest involved was less than $5.00, while in the case at bar interest involves more than $10,000.00.

Section 5972, Compiled Oklahoma Statutes 1921 (quoted by petitioners) is not a limitation upon the allowance of interest upon damages, but is an express command that interest be allowed under certain conditions. It is our contention that said section of the statutes is not applicable to the situation here presented. This action is not for damages in the ordinary meaning of that word. It is an action to recover money due upon contract. Therefore, it is our contention Sections 5976 and 5977, Compiled Oklahoma Statutes 1921, more nearly apply. These sections read:

> "5976. For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things would be likely to result therefrom. No damages can be recovered for a breach of contract, which are not clearly ascertainable in both their nature and origin.
>
> "5977. The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon."

It would seem the Circuit Court of Appeals was of the opinion Section 5977 was more nearly applicable.

As to authorities from other jurisdictions in addition to those cited by the Circuit Court of Appeals, see: *Standard Oil Co.* v. *United States,* 267 U. S. 26; *The Scotland,*

105 U. S. 24 at 35; *Southern Pacific Co.* v. *Arnett,* 126 Fed. 75 (8 C. C. A.); *Laycock* v. *Parker,* 103 Wis. 161, 79 N. W. 327; *Cox* v. *McLaughlin,* 76 Cal. 60, 18 Pac. 100; *Huchberger* v. *Home Fire Ins. Co.,* 12 Fed. Cases 793, Case No. 6821; *Fireman's Fund Ins. Co.* v. *Haley,* 129 Miss. 525, 92 So. 635; *Cottingham* v. *National Mutual Church Ins. Co.,* 209 Ill. App. 557, 124 N. E. 822; *Columbia Real Estate & Trust Co.* v. *Royal Exchange Assurance,* 132 S. C. 427, 128 S. E. 865; *Berry* v. *Virginia State Ins. Co.,* 83 S. C. 13, 64 S. E. 859; *Olson* v. *Herman Farmers Mutual Ins. Co.,* 187 Wis. 15, 203 N. W. 743; *Aetna Ins. Co.* v. *Solomon,* 172 Ark. 169, 287 S W. 1000; *Continental Ins. Co.* v. *Nabors* (Texas Civ. App.), 6 S. W. (2d) 151; *Home Ins. Co.* v. *Bennett* (Texas Civ. App.), 9 S. W. (2d) 432; *Baker* v. *Northern Assurance Co.,* 214 Mich. 540, 183 N. W. 61, and *Reed* v. *Continental Ins. Co.* (Del.), 65 Atl. 569. Not only is the decision in this case in accord with the great weight of authority, but it is not in conflict with any established rule in Oklahoma. The only conflict is between the decisions of the Oklahoma Supreme Court. Whichever way the Circuit Court of Appeals might have decided this question, it would have been in accord with and supported by the decisions of that Court. Therefore, we respectfully submit this Honorable Court should deny the issuance of the writs upon this question.

II.

Did the Court err in holding the petitions stated facts sufficient to constitute a waiver of written, verified proof of loss?

The Circuit Court of Appeals struck the bill of exceptions from the record (Tr. 400), and the cause was presented to that Court upon the transcript only. Therefore, this question must be determined by whether or not the allegations of respondent's amended petitions are sufficient to constitute a waiver of the furnishing of written, verified proof of loss, in the strict manner provided in the policies. We will not attempt to set out those allegations. They can be found in the transcript at pages 11, 46, 68 and 90, and are summarized in the Circuit Court of Appeals opinion T. 404 *et seq.*)

We respectfully contend there is no conflict on this question between the decision of the Circuit Court of Appeals and the opinions of this Honorable Court, and there is not sufficient conflict, if any, between said decision and the opinions of any of the other Circuit Courts of Appeals to warrant the issuance of said writs of certiorari. In fact all of the Circuit Courts of Appeals are now substantially in accord on this question.

Petitioners contend the decision is in conflict with *Riddlebarger* v. *Hartford Fire Ins. Co.*, 74 U. S. 386; *Imperial Fire Ins.Co.* v. *County of Coos*, 151 U. S. 452; *North-*

ern Assurance Co. v. *Grand View Building Ass'n.*, 183 U. S. 308; *Lumber Underwriters* v. *Rife*, 237 U. S. 605; *Penman* v. *St. Paul Fire & Marine Ins. Co.*, 216 U. S. 311, and *Aetna Life Ins. Co.* v. *Moore*, 231 U. S. 543. None of these cases involved a waiver of proof of loss. They all involved a violation of covenants to be kept by the insured prior to a loss, except the latter case, which involved an untrue representation and warranty made by the insured in obtaining a life insurance policy, and the further exception that *Riddlebarger* v. *Hartford Fire Ins. Co., supra*, involved a question of limitations.

Petitioners also contend the decision is in conflict with the following decisions by the Circuit Courts of Appeals: *Atlas Reduction Co.* v. *New Zealand Ins. Co.*, 138 Fed. 497 (8 C. C. A.); *Fidelity Phoenix Fire Ins. Co.* v. *Queen City Bus & Transfer Co.*, 3 Fed. (2d) 784 (4 C. C. A.); *Fidelity Union Fire Ins. Co.* v. *Kelleher*, 13 Fed. (2d) 745 (9 C. C. A.); *Fire Association of Philadelphia* v. *Nime*, 9 Fed. (2d) 28 (5 C. C. A.); *Hartford Fire Ins. Co.* v. *Nance*, 12 Fed. (2d) 575 (6 C. C. A.), and *Scottish Union & National Ins. Co.* v. *Encampment Smelting Co.*, 166 Fed. 231 (8 C. C. A.). None of these cases involve waiver of proof of loss, except *Scottish Union & National Ins. Co.* v. *Encampment Smelting Co., supra*, by the Eight Circuit.

Missouri Pacific Ry. Co. v. *Western Assurance Co.*, 129

Fed. 610; *San Francisco Savings Union* v. *Western Assurance*, 157 Fed. 695, and *Bank of South Jacksonville* v. *Hartford Fire Ins. Co.*, 1 Fed. (2d) 43; cited by petitioners, are all district court cases. Only the first case involved waiver of proof of loss. *North British & Mercantile Ins. Co.* v. *Lamar Harris*, 34 Fed. (2d) 94, cited by petitioners, we are unable to find.

An examination of all the cases cited by petitioners disclose no case by this court in conflict with the decision in the case at bar, and none by the Circuit Courts of Appeals, except *Scottish Union & National Ins. Co.* v. *Encampment Smelting Co.*, *supra*, by the Eight Circuit. The court there based its decision largely upon *Northern Assurance Co.* v. *Grand View Building Ass'n.*, *supra*, by this court. In our judgment, it misinterpreted that decision. This court was not deciding a question of waiver of proof of loss, but the violation of a provision against additional insurance; a covenant to be kept and performed before a loss; a condition of the insurance; not a condition subsequent to facilitate adjustment of the loss, but a condition precedent to liability. For these reasons *Northern Assurance Co.* v. *Grand View Building Ass'n.*, *supra*, and *Lumber Underwriters* v. *Rife*, *supra*, were distinguished in *Twin City Ins. Co.* v. *Stockmen's National Bank*, 261 Fed. 470 (9 C. C. A.), and *Continental Ins. Co.* v. *Fortner*, 25 Fed. (2d) 398 (6 C. C. A.).

Other cases supporting the rule that proof of loss may be waived by conduct and oral statements are: *Jackson* v. *Fidelity & Casualty Ins. Co.*, 75 Fed. 359 (5 C. C. A.); *Globe & Rutger's Ins. Co.* v. *Prairie Oil & Gas Co.*, 248 Fed. 452 (2 C. C. A.); *Alliance Ins. Co.* v. *Enders*, 293 Fed. 485 (9 C. C. A.); Home *Ins. Co.* v. *Hightower*, 22 Fed. (2d) 882 (5 C. C. A.). Certiorari denied in the later case, 276 U. S. 634. *Firemen's Ins. Co.* v. *Brooks*, 32 Fed. (2d) 451 (6 C. C. A.).

In two late cases the Eighth Circuit has expressed doubt as to the correctness of its decision in the *Scottish Union & National Ins. Co.* v. *Encampment Smelting Co., supra; New York Underwriters Fire Ins. Co.* v. *Malhan & Co.*, 25 Fed. (2d) 415, and *Hartford Fire Ins. Co.* v. *Empire Coal Co.*, 30 Fed. (2d) 794.

In line with the authorities that provisions of a policy to be performed after a loss can be waived by conduct, this court, in *Thompson* v. *Phoenix Ins. Co.*, 136 U. S. 287, held that a provision in the policy limiting the time within which an action could be instituted was waived. Other cases holding that limitation provisions of a policy may be waived are: *Steel* v. *Phoenix Ins. Co.*, 51 Fed. 715 (9 C. C. A.); *Lynchburg Cotton Mill Co.* v. *Travelers Ins. Co.*, 149 Fed. 954 (4 C. C. A.); *Fellman* v. *Royal Ins. Co.*, 184 Fed. 577 (5 C. C. A.), and *Jackson* v. *Fidelity & Casualty Co.*, 75 Fed. 359 (5 C. C. A.). This court in *Royal Ins. Co.* v. *Martin*,

192 U. S. 149, at 162 held that proofs of loss were waived where the insurer denied liability or refused to pay in any event. This opinion is squarely against the contention of petitioners that proof of loss cannot be waived, except by endorsement in writing upon the policy. It would seem if it could be waived by one method of conduct, it could by another.

The opinion in the case at bar is in harmony with the decisions of the State courts of all the states embraced within the Tenth Circuit.

Kansas:

German Insurance Co. v. *Gray*, 43 Kan. 497, 23 Pac. 637.

Ross et al. v. *Phenix Ins. Co.*, 84 Kan. 572, 114 Pac. 1054.

Ring v. *Phoenix Assurance Co.*, 100 Kan. 341, 164 Pac. 303.

Clark v. *Milwaukee Mechanic's Ins. Co.*, 105 Kan. 728, 185 Pac. 1056.

Colorado:

Helvetia Swiss Fire Ins. Co. v. *Edward P. Allis Co.*, 11 Colo. A. 264, 53 Pac. 242.

American Century Ins. Co. v. *Donlon*, 16 Colo. A. 416, 66 Pac. 249.

Hartford Fire Ins. Co. v. *Hammond*, 41 Colo. 323, 92 Pac. 686.

Wyoming:

Kahn v. *Traders Ins. Co.*, 4 Wyo. 419, 34 Pac. 1059.

New Mexico:

Robinson v. *Palatine Ins. Co.*, 11 N. M. 162, 66 Pac. 535.

Oklahoma:

Western National Ins. Co. v. *Marsh*, 34 Okla. 414, 125 Pac. 1094.

State Mutual Ins. Co. v. *Green*, 62 Okla. 214, 166 Pac. 105.

Hartford Fire Ins. Co. v. *Sullivan*, 74 Okla. 241, 179 Pac. 24.

American Ins. Co. v. *Ott*, 97 Okla. 125, 223 Pac. 121.

Atlas Assurance Co. v. *Leonard*, 108 Okla. 150, 234 Pac. 771.

Great American Ins. Co. v. *Herrington*, 127 Okla. 13, 259 Pac. 582.

Utah:

West v. *Norwich Union Fire Ins. Co.*, 10 Utah 442, 37 Pac. 685.

Osborne v. *Phenix Ins. Co.*, 23 Utah 428, 64 Pac. 1103.

Loftis v. *Pacific Mutual Ins. Co.*, 38 Utah 532, 114 Pac. 134.

Respondent's petitions not only alleged waiver of proof *of loss, but estoppel of petitioners to plead failure to furnish proofs in the strict manner provided in the policies* (T. 13 *et seq.*, T. 404 *et seq.*).

We respectfully submit the decision is in accord with

the great weight of authority on both questions raised, and the applications for writs of certiorari should be denied.

Respectfully submitted,

R. M. Rainey,
Streeter B. Flynn,
Frank G. Anderson,
Chester H. Lowry,
Counsel for Respondent.

Rainey, Flynn, Green
& Anderson, of Counsel.